Supreme Court, U.S.
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No. 97-1937

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

CITY OF ATLANTIC CITY,
Petitioner,

v.

MILTON PEVNER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Respondent disagrees with petitioner's statement of questions presented for review. The question presented for review is whether this Court should exercise its discretion to grant the petition, when petitioner has not shown an important or compelling reason for granting certiorari and the issues relate solely to awards of monetary damages and prejudgment interest, which were subject to review on appeal under an extremely limited, abuse of discretion standard.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to this proceeding.

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STATEMENT OF THE CASE

A. Overview

In 1988, Dr. Milton Pevner purchased an eight-bedroom house in Atlantic City, New Jersey, with the intention of renting it out for income (A 20-21; SA 2).[1] At the time Dr. Pevner purchased that property, the City of Atlantic City ("Atlantic City") had in effect a restrictive zoning ordinance ("Ordinance") that prohibited more than three unrelated persons from occupying a single home in certain residential districts (A 20-21; SA 2). Beginning in the spring of 1989 and continuing through June of 1991, Atlantic City filed dozens of separate criminal charges against Dr. Pevner alleging that he violated the Ordinance repeatedly (A 21; SA 2). Since each separate violation of the Ordinance carried with it a potential jail sentence of ninety days, Dr. Pevner, if convicted, faced the prospect of going to jail for more than ten years (A 21). Although Dr. Pevner pleaded not guilty to all of the charges and denied that he had ever permitted more than three unrelated persons to occupy the property, the ever-increasing number of criminal charges caused him to reasonably become terrified that he *could* be thrown in jail for a long time. Furthermore, the threat of a lengthy incarceration hung over his head for *more than 18 months* while he awaited his criminal trial (A 21; SA 2).

While the criminal charges were pending, Dr. Pevner became aware that publicity surrounding the charges was

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[1] References to the appendix attached to the petition for writ of certiorari shall be cited herein as "A ____", with the page numbers following the designation "A". References to the supplemental appendix which was filed by petitioner under separate cover shall be cited as "SA ___", with the page numbers following the designation "SA".

widespread in and around the Atlantic City area (A 21). Several days of hearings on the criminal charges were conducted before the Atlantic City municipal court between October 1990 and February 1991 (A 21; SA 2). Because Atlantic City regarded the case against Dr. Pevner as a "test case" for enforcement of the Ordinance, it hired a special prosecutor (A 21). Finally, on February 15, 1991, the municipal court found Dr. Pevner guilty on all charges, sentenced him to probation for one year and ordered him to pay a heavy fine (A 21-22; SA 2).

Dr. Pevner appealed his conviction to the Superior Court of New Jersey which, in an order dated June 7, 1991, reversed the conviction, determined that Dr. Pevner was not guilty of even one violation of the Ordinance and declared that the Ordinance was unconstitutional because it "placed unreasonable restrictions upon [Dr. Pevner's] right to use and rent [his property], contrary to the Constitutional requirements of substantive due process" guaranteed by the Fourteenth Amendment and the New Jersey Constitution (A 22; SA 2-3). The Superior Court of New Jersey found also that "there was insufficient, credible admissible evidence" to sustain the guilty verdict (SA 3). Atlantic City did not appeal from or request reconsideration of the Superior Court's ruling (A 22; SA 3).

B. History of the Proceedings

On May 27, 1993, Dr. Pevner commenced an action against Atlantic City under 42 U.S.C. § 1983 ("§1983") and the New Jersey Constitution, alleging that Atlantic City's two-year criminal prosecution of him under the invalid Ordinance violated the United States and New Jersey Constitutions and caused him to suffer severe emotional distress, mental anguish, embarrassment, humiliation, damage to his reputation as well as various economic losses (A 1-15,

22; SA 3). In an order dated December 29, 1994, the district court granted Dr. Pevner's motion for summary judgment on the issue of Atlantic City's liability under § 1983 and the New Jersey Constitution, determining as a matter of law that Atlantic City "violated 42 U.S.C. § 1983 and the New Jersey Constitution, and [Dr. Pevner's] rights to due process thereunder, by prosecuting [Dr. Pevner] under [the] Ordinance... and by otherwise enforcing the said Ordinance against [him]" (A 16-17, 22; SA 3).

After determining the liability issues in favor of Dr. Pevner, the district court scheduled a jury trial on Dr. Pevner's damages claims. That trial was conducted between March 18, 1996 and March 21, 1996 (A 22-23; SA 3). Nine witnesses, including Dr. Pevner's treating psychiatrist, testified for Dr. Pevner during the damages trial, and no rebuttal evidence was offered by Atlantic City (A 23, 45-46 n.9; SA 15). The jury thus received what the district court referred to as "a mountain of evidence" that allowed it to determine and assess the severe harm, damages and injuries which Dr. Pevner had suffered and would continue to suffer as a result of Atlantic City's proven violation of his rights (A 45-46 n. 9; SA 6-16). As the district court and court of appeals noted, Dr. Pevner's witnesses established compellingly, without any contradictory evidence offered by Atlantic City, that Atlantic City's violation of his rights caused him to suffer out-of-pocket economic losses that amounted to $363,130 in the aggregate,[2] as well as a

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[2] Atlantic City conceded in its post-trial motion, in its appeal to the Third Circuit and in its petition for writ of certiorari filed with this Court that, at trial, Dr. Pevner presented evidence of $363,130 in special, economic damages resulting from the constitutional violations and that the jury had a proper and valid basis for awarding all of these damages to Dr.

(continued...)

devastating psychiatric illness that drastically altered his personality and self-image and reduced his formerly active, robust and energetic lifestyle to a pale and lusterless shell of what it had been prior to 1989 (A 23-28, 37-49; SA 6-16). For example, Dr. Pevner's witnesses testified that Atlantic City's wrongful, relentless prosecution of him had forced him to all but give up his thriving neighborhood dental practice and had transformed him from an active, fun-loving husband, father and dentist, into an untrusting, depressed, lifeless, brooding man who would not leave his home and could no longer function as a self-sufficient adult (A 23-28, 37-49; SA 6-16). Furthermore, the unrebutted evidence offered by Dr. Pevner's treating psychiatrist and other witnesses established that Dr. Pevner's mental illness caused by the 1989-91 prosecution did not improve or suddenly disappear when he "won" his criminal case on appeal in 1991, but rather, that he continued to experience severe and unremitting anxiety, depression, mental anguish and emotional distress as a result of the prosecution right up to the time of trial in 1996 (A 41-44; SA 7-11).

Common law tort principles governed the proofs at the damages trial because, as this Court has noted, 42 U.S.C. § 1983 creates "a species of tort liability in favor of persons who are deprived of 'rights, privileges or immunities' secured to them by the Constitution." *Carey v. Piphus*, 435 U.S. 247, 253 (1978). *See also, Memphis Community School*

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[2](...continued)
Pevner (A 33; SA 6-7, 12-13; petition for certiorari at 4 & n. 1). Atlantic City has acknowledged that these economic damages consisted of attorney's fees which Dr. Pevner incurred in defending the criminal prosecution, lost rental income from the property, Dr. Pevner's past and future psychiatric bills and income that Dr. Pevner lost from his dental practice from 1989 through 1995 due to stress and anxiety resulting from the criminal prosecution. (Petition for certiorari at 4 & n.1).

District v. Stachura, 477 U.S. 299, 306 (1986). As this Court has declared, "[t]he basic purpose" of a § 1983 damages claim is "to compensate [the plaintiff] for injuries that were caused by the deprivation of constitutional rights," *Carey, supra,* at 254, and therefore, damages to redress a proven violation of § 1983 "may include not only out-of-pocket loss and other monetary harm, but also such injuries as 'impairment of reputation..., personal humiliation and mental anguish and suffering'", *Stachura, supra,* at 306-07, *quoting Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).[3]

On March 22, 1996, the jury returned a general verdict in favor of Dr. Pevner which awarded him $1,238,788.50 in *compensatory* damages as a remedy for Atlantic City's violations of § 1983 (A 18-19, 29; SA 3). In awarding this amount to Dr. Pevner, the jury answered the following question:

> What amount do you find will reasonably and *fairly compensate* plaintiff Milton Pevner for the damages he has sustained? (emphasis added) (A 18).

On April 4, 1996, Atlantic City filed a motion for a new trial on damages, or in the alternative, for remittitur of

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Atlantic City's contention that, at trial, Dr. Pevner only presented evidence of $363,130 in special damages, and did not offer any evidence of pain and suffering, emotional distress, mental anguish, etc. (petition for certiorari at 4), is thoroughly repudiated by the entire trial record. In actuality, and as the district court and court of appeals found, Dr. Pevner offered page after page of compelling, unrebutted testimony of these intangible, non-economic harms and his proofs were fully consistent with the teachings of this Court in *Carey* and *Stachura* (A 23-28, 37-49; SA 6-16).

the verdict (A 29; SA 3). Atlantic City's post-trial motion raised one issue only – that the verdict was excessive.

On May 13, 1997, the district court issued an opinion and order regarding Atlantic City's post-trial motion in which it found, after conducting a thorough and comprehensive review of the record, that: (a) as Atlantic City had conceded, the evidence supported an award to Dr. Pevner of $363,130 in special, economic damages; (b) in addition, Dr. Pevner had proven an entitlement to a substantial award of non-economic damages for pain and suffering, emotional distress, mental anguish, humiliation and impairment of reputation; (c) Atlantic City's arguments that Dr. Pevner's evidence of emotional distress was too speculative and that any emotional distress he suffered was not proximately caused by the constitutional violations were without merit; and (d) however, the jury's award to Dr. Pevner of approximately $875,000 for pain and suffering, emotional distress, mental anguish, humiliation and other non-economic damages was excessive (A 20-52; SA 3). After conducting a well-reasoned and painstaking analysis of the trial record and reviewing jury verdicts and other § 1983 cases, the district court concluded that the evidence supported an award to Dr. Pevner of $500,000 (rather than $875,000) for pain and suffering, emotional distress, mental anguish, humiliation and harm to reputation (A 45-52). Accordingly, the district court denied Atlantic City's motion for a new trial but granted its request for remittitur, giving Dr. Pevner the option of accepting a remittitur of the verdict from $1,238,788.50 to $863,130,[4] or

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[4] The figure $863,130 represented the $363,130 in undisputed special damages plus the additional sum of $500,000 which the district court determined was appropriate to compensate Dr. Pevner for his non-economic injuries (pain and suffering, emotional distress and the like) (A (continued...)

submitting to a new trial on damages (A 52). On May 21, 1997, Dr. Pevner accepted remittitur of the jury verdict to $863,130, and therefore waived a new trial on damages (A 53-55).

After judgment was entered on the verdict, Dr. Pevner filed a motion pursuant to Fed.R.Civ.P. 59(e) to amend the judgment to include prejudgment interest (A 58). In a letter opinion that was filed on June 6, 1997, the district court granted that motion and awarded Dr. Pevner prejudgment interest, pursuant to § 1983, in the amount of $131,404.83 (A 58-62). In support of its ruling, the district court reviewed the controlling authority which provides that in § 1983 cases, district courts have the equitable discretion to award prejudgment interest to prevailing plaintiffs (A 59-60). The court then determined that, under the facts of this case, an award of prejudgment interest to Dr. Pevner was appropriate to effectuate the salutary purposes of § 1983 as well as to promote the policy of encouraging defendants to settle at the early stages of litigation (A 59-62). On the latter point, the district court noted that Atlantic City did not make its first settlement offer until the day of trial, and therefore, could not be heard to complain that Dr. Pevner was not entitled to be compensated for the lost use of the money he was awarded by the jury (A 62).[5]

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[4](...continued)
52).

[5] The district court calculated prejudgment interest pursuant to 28 U.S.C. § 1961 at the rate of 5.14%, with annual compounding from the time the action was commenced until the date judgment was entered. Atlantic City did not take issue with the method of calculation or the rate used. Rather, it argued that Dr. Pevner was not entitled to prejudgment (continued...)

On June 6, 1997, the district court granted an amended judgment in favor of Dr. Pevner and against Atlantic City in the amount of $994,534.83 (A 56-57). The amended judgment included the remitted verdict of $863,130, plus prejudgment interest in the amount of $131,404.83 (A 56-57).

Atlantic City appealed the district court's order granting the amended judgment to the Third Circuit. On appeal, Atlantic City challenged the district court's denial of its motion for a new trial, its decision to remit the verdict to $863,130 (rather than to a lesser amount) and its order awarding prejudgment interest (SA 1-2, 4). Atlantic City did *not* challenge in its appeal to the Third Circuit the district court's liability determination in favor of Dr. Pevner; rather, the appeal focused solely upon the district court's rulings regarding the damages issues (SA 1-21).

In a reasoned and scholarly opinion filed on February 9, 1998, the Third Circuit affirmed the judgment of the district court, determining that the district court did not abuse its discretion in denying Atlantic City's motion for a new trial, in remitting the verdict to $863,130 or in awarding prejudgment interest to Dr. Pevner on his § 1983 claim (SA 1-21). The Third Circuit emphasized the limited nature of the scope of its review and the broad discretion that is accorded to district courts in deciding post-trial motions relating to damages awards (SA 4-6). *See, Gumbs v. Pueblo Int'l., Inc.*, 823 F.2d 768, 771 (3d Cir. 1987) (emphasizing Third Circuit's "severely limited" role in reviewing trial courts' decisions on motions for new trial or remittitur); *Semper v. Santos,* 845 F.2d 1233, 1236 (3d Cir. 1988) (stressing that

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[5](...continued)
interest as a matter of law.

district court's ruling on adequacy of damages should not be disturbed on appeal unless "manifest abuse of discretion" can be shown); *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030, 1039 (3d Cir. 1987) ("[T]he scope of [Third Circuit's] review of a damage award is exceedingly narrow"). Relying upon its prior decisions and the decisions of other courts of appeal, the Third Circuit stated that where, as in this case, the damages awarded by a jury have already been subjected to thorough scrutiny by the trial court and the trial court has granted a remittitur, the court of appeals should give "additional deference" to the trial court's ruling. *See, Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 206 (3d Cir. 1996); *DeLeon Lopez v. Corporacion Insular De Seguros*, 931 F.2d 116,126 (1st Cir. 1991) (SA 5). In addition, citing to its earlier decisions, the Third Circuit noted that it was hesitant to reverse a factual determination by the trial judge regarding pain and suffering and emotional distress damages because evidence of those types of damages is "particularly ill-suited to review upon only a written record". *Edynak v. Atlantic Shipping Inc. CIE, Chambon Maclovia S.A.*, 562 F.2d 215, 227 n. 16 (3d Cir. 1977) (SA 5).[6]

After discussing the narrow scope of its review and the broad discretion it was obliged to accord to the district court, the Third Circuit rejected each of the arguments Atlantic City made in its appeal (SA 6-21). Specifically, the Third Circuit rejected Atlantic City's arguments that Dr. Pevner's evidence of emotional distress was too speculative; that Dr. Pevner failed to prove that his emotional distress was proximately caused by Atlantic City's violations of 42 U.S.C.

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[6] The Third Circuit stated also that the scope of its review of the district court's award of prejudgment interest was likewise limited to abuse of discretion. *Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1002 (3d Cir. 1992) (SA 5).

§ 1983; that Dr. Pevner was entitled to recover no more than the $363,130 in economic damages which he proved at trial;[7] and that the additional sum of $500,000 that Dr. Pevner was awarded for non-economic injuries was not supported by the evidence (SA 6-16). In concluding that the district court did not abuse its discretion in any of its rulings, the Third Circuit performed its own comprehensive review of the plethora of unrebutted evidence that Dr. Pevner presented at trial (SA 6-16).

The Third Circuit also affirmed the district court's award of prejudgment interest to Dr. Pevner, finding that there was no abuse of discretion and that the facts of the case supported such an award (SA 16-21). In upholding the award of prejudgment interest, the Third Circuit dismissed Atlantic City's contention that prejudgment interest was not available to Dr. Pevner under New Jersey law (on his companion state claim arising under the New Jersey Constitution), noting that the district court had expressly awarded prejudgment interest under *federal* law (§1983) and had properly refused to determine whether prejudgment interest was available under New Jersey law because Dr. Pevner had elected to receive the interest under *federal* law alone (A 59; SA 17). *See, Hatco Corp. v. W.R. Grace & Co.,* 849 F.Supp. 931, 980 (D.N.J. 1994) (where plaintiff in federal action prevails on federal and state claims which arise from same facts, plaintiff may elect to receive prejudgment interest under either federal or state law).

On February 9, 1998, the Third Circuit entered a

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7 The Third Circuit correctly noted that both parties acknowledged that the jury awarded Dr. Pevner damages, based upon evidence presented at trial, of $363,130 in out-of-pocket, economic losses (SA 7 & n. 2; 12).

judgment affirming the judgment of the district court which awarded Dr. Pevner $994,534.83 (A 56-57; SA 22). Atlantic City's petition for certiorari followed.

REASONS FOR DENYING THE WRIT

A. Atlantic City's petition does not present any compelling reason for granting a writ of certiorari

Supreme Court Rule 10 provides, in relevant part, that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" and that "certiorari will be granted only for compelling reasons". Rule 10 goes on to state that such "compelling reasons" may be found to exist where a United States Court of Appeals has rendered a decision that conflicts with a decision of another United States Court of Appeals on the same important matter, a United States Court of Appeals has decided an important federal question in a way that conflicts with a decision by the highest court of a state or where a United States Court of Appeals has decided an important question of federal law in a way that conflicts with decisions of this Court. Furthermore, Rule 10 states that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Atlantic City's petition does not even arguably implicate any of the "compelling reasons" for granting certiorari which are listed in Supreme Court Rule 10. Rather, the gist of Atlantic City's petition is that the *factual findings* made by the district court and the Third Circuit regarding Dr. Pevner's damages claims are erroneous, and that the district court and Third Circuit abused their discretion in deciding Atlantic City's motion for new trial and Dr.

Pevner's motion for prejudgment interest. Dr. Pevner strongly disputes that either of the courts below made any erroneous factual findings or committed an abuse of direction. For the purposes of this brief, however, it suffices to say that Atlantic City's petition should be denied for no other reason than it fails to come close to demonstrating that there is a "compelling reason" for granting certiorari, as defined by Supreme Court Rule 10.

To further prove the point, this Court has established a general rule that it will *not* review an order issued by a district court or court of appeals denying a motion for new trial which alleged that a jury verdict was excessive. As this Court stated in *Fairmount Glass Works v. Coal Co.*, 287 U.S. 474, 481 (1933):

> The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals.

Accord, *Southern Railway Co. v. Bennett*, 233 U.S. 80, 87 (1914); *Lincoln v. Powers*, 151 U.S. 436 (1894); *Herencia v. Guzman*, 219 U.S. 44, 45 (1910). Since Atlantic City's petition challenges *factual* determinations relative to a damages award, this line of authority precludes the granting of certiorari.

To be sure, this Court's policy of refusing to review cases such as this is based upon sound logic, since a district

court's action in denying a new trial on damages or in granting a remittitur is subject to review by a court of appeals under a narrow abuse of discretion standard. *Browning-Ferris v. Kelco Disposal*, 492 U.S. 257, 279 (1989). In decisions which have not been challenged by Atlantic City, the Third Circuit has ruled that the scope of its review of a damages award is "exceedingly narrow", *Williams,* 817 F.2d at 1038, and that when a remittitur has already been granted by the district court, the scope of its review is "severely limited," *Delli Santi*, 88 F.3d at 206. The First Circuit in *DeLeon Lopez, supra*, echoed this well-settled principle of law when it stated, at 931 F.2d 125:

> [W]hen the trial judge performs verdict surgery [by granting a remittitur]..., an appellate court must be slow to interfere with the operation's outcome. The reason is apparent... '[I]t is surpassingly difficult on the basis of an algid appellate record to quantify money damages for intangible losses.' (citation omitted). Where, as here, the plaintiff's injuries fall within this rubric, and there exists no truly objective way to measure damages, the trial judge's view is entitled to considerable deference. (citation omitted). In other words, the scope of appellate review of post-remittitur damages for non-economic losses is extremely narrow and the ambit of the trial court's discretion is correspondingly broad.

This rationale is particularly applicable to the instant case since the district court remitted the portion of the verdict which was intended to compensate Dr. Pevner for his non-economic injuries by approximately $375,000. The Third Circuit having refused to remit the verdict again, further

review by this Court is clearly inappropriate.

It is also well established that an appellate court should be extremely reluctant to disturb the decision of a trial court denying a new trial or setting the amount for remittitur because "[t]he trial judge is in the best position to evaluate the evidence and assess whether the jury's verdict is rationally based." *Gumbs, supra*, 823 F.2d at 772. *Accord, Kazan v. Wolinski*, 721 F.2d 911, 914 (3d Cir. 1983) (considerable deference should be given to trial judge, "who was present to hear all the evidence and to observe the demeanor of all the witnesses"); *Anthony v. G.M.D. Airline Services*, 17 F.3d 490, 496 (1st Cir. 1994) ("Having presided over the trial and observed...the...witnesses firsthand, the district court judge is in the best position to assess the evidence and set an amount for remittitur"); *Latino v. Kaizer*, 58 F.3d 310, 314 (7th Cir. 1995) ("Because the trial judge is uniquely situated to rule on [a motion for new trial, he] has great discretion in determining whether to grant a new trial"). Furthermore, the courts of appeal have established the general principle that damages for pain and suffering and emotional distress are not rationally a subject for a second remittitur on appeal. *DeLeon Lopez, supra*, 931 F.2d at 126 (where damages awarded by jury have been subjected to thorough scrutiny by trial judge who remitted verdict, "the court of appeals has no warrant to insist upon a retrial or to reduce the award still further"). *See also, Gatreaux v. Scurlock Marine, Inc.*, 84 F.3d 776, 783 (5th Cir. 1996) (because "[a]wards of pain and suffering are fact-specific and depend to a great extent on the fact-finder's observation of the plaintiff and its subjective determination of the amount needed to achieve full compensation...the district court is accorded great latitude in assessing damages"); *Correa v. Hospital San Francisco*, 69 F.3d 1184, 1197 (1st Cir. 1995) (appellate court's normal disinclination to second guess jury evaluation of proper amount of damages "is magnified where...the damages entail a monetary evaluation

of intangible losses"). This long line of well-settled authority simply underscores the fact that Atlantic City has not presented a "compelling reason" for granting a writ of certiorari.

B. There is nothing in the record to suggest that any of the damages awarded to Dr. Pevner were punitive

Atlantic City's argument that the damages award reflects that the jury intended to punish Atlantic City is pure speculation. Indeed, Atlantic City has pointed to nothing in the record, other than the verdict itself, which suggests that the jury wanted to punish Atlantic City. On the other hand, Dr. Pevner did not ask for punitive damages and the district court did not charge the jury on punitive damages. However, in accordance with the teachings of this Court in *Carey* and *Stachura*, the district court did instruct the jury that the sole purpose of a damages award in a § 1983 case is to fairly *compensate* the plaintiff for injuries proximately caused by the deprivation of his constitutional rights (A 18). Atlantic City's "punishment" argument is further belied by its own admission that the jury had a valid basis for awarding Dr. Pevner $363,130 in special *compensatory* damages and the fact that, as the district court and Third Circuit found, the evidence fully supported the remitted award of $500,000 for non-economic *compensatory* damages (A 23-28, 33, 37-52; SA 6-16; petition for certiorari at 4, 7).

In rejecting Atlantic City's contention that the jury intended to assess punitive damages against Atlantic City, the Third Circuit, after reviewing the record, properly concluded that "the jury and the district court acted within the bounds of their discretion by finding that Dr. Pevner was entitled to a substantial award beyond the damages awarded for his actual

[economic] losses" (SA 15). In dismissing Atlantic City's argument that even the remitted non-economic damages award of $500,000 was punitive, the Third Circuit opined:

> The district court's 'careful review of the evidence presented at trial'...revealed that a reasonable jury could have provided Dr. Pevner with $500,000 in intangible relief. Dr. Pevner presented nine witnesses, none of which were rebutted, to show that he had sustained extensive pain and suffering since 1989. Those nine witnesses established, *inter alia*, that the City's prosecution caused Dr. Pevner severe emotional distress,...ruined his dental career and professional life,...and created the need for long-term psychological care... (SA 15).

There is simply no basis whatsoever for questioning or reviewing the Third Circuit's conclusions, which find ample support in the record.

Atlantic City's reliance upon this Court's decision in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), is misplaced. In *City of Newport*, the plaintiffs brought suit against a city under § 1983 and sought to recover compensatory *and* punitive damages. Without any objection, the trial court gave an instruction authorizing the jury to award punitive damages against the city. The jury found in favor of the plaintiffs and returned a verdict against the city which included punitive damages. The city moved for a new trial, arguing that punitive damages could not be awarded against a municipality under § 1983. On appeal, this Court ruled, as a matter of law, that municipalities are immune from liability for punitive damages under § 1983. 453 U.S. at 271. However, this Court in *City of Newport* was careful to point

out that *compensatory* damages can be awarded against municipalities to remedy violations of § 1983. 453 U.S. at 270. And of course, in *Carey* and *Stachura, supra,* this Court expressly ruled that a plaintiff who prevails in a § 1983 case is entitled to recover *compensatory* damages for mental anguish, emotional distress, humiliation and impairment to reputation.

Dr. Pevner's case has virtually nothing in common with *City of Newport* for the simple reason that he did not *sue* for punitive damages, the jury in his case was not *charged* on punitive damages and the jury in his case did not *award* any punitive damages. Rather, his entire damages award was comprised of *compensatory* damages. On the other hand, it was precisely *because* the jury in *City of Newport* was charged on and awarded punitive damages that this Court granted certiorari. In light of these obvious distinctions, Atlantic City's argument that the Third Circuit's decision in this case is inconsistent with this Court's holding in *City of Newport* is, to put it charitably, specious. In actuality, the two cases are not even remotely analogous. Whereas the jury and the district court in this case had every right and reason to award Dr. Pevner $500,000 in intangible *compensatory* damages, the jury in *City of Newport* was precluded as a matter of law from awarding *punitive* damages against the defendant city.[8]

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[8] As the Third Circuit determined, Atlantic City's reliance upon *Sanders v. City of Indianapolis*, 837 F.Supp. 959 (S.D. Ind. 1992), to show that the damages awarded to Dr. Pevner were presumptively punitive, is also misplaced (SA 15). The holding in *Sanders* was limited to the facts of that particular case, where the plaintiff presented no evidence of medical expenses, psychological treatment or harm to his reputation. *Id.* 965-66. Conversely, as the Third Circuit duly noted, Dr. Pevner presented compelling unrefuted evidence of all three of these types

(continued...)

C. Atlantic City's argument that Dr. Pevner presented evidence of no more than $363,130 in damages is thoroughly repudiated by the record

In its petition, Atlantic City urges that "Dr. Pevner's own proofs sought damages of no more than $363,130," and that he only *attempted* to prove he was entitled to recover that amount. Therefore, Atlantic City contends, Dr. Pevner's damages should have been "capped" at $363,130, which both parties acknowledged represented the full amount of his special, economic damages. Accordingly, the argument goes, the additional award of $500,000 to Dr. Pevner for pain and suffering, emotional distress, etc. is not supported by any evidence.

This argument is premised on a gross misapprehension of the record. As the district court and the Third Circuit properly found, the trial record contained page after page of compelling, uncontradicted proof from nine witnesses which gave the jury every right to conclude that Atlantic City's wrongful acts caused Dr. Pevner to suffer severe and unremitting psychiatric illness, mental anguish, emotional distress, anxiety, stress, humiliation and impairment of reputation, *in addition to* the $363,130 in economic losses (A 23-28, 37-49; SA 6-16). This unrefuted evidence led the district court to conclude, rightfully, that reimbursing Dr. Pevner for his economic losses did *not* fully compensate him for the injuries caused by Atlantic City's violations of his rights (A 33-35). The same evidence caused the Third Circuit to determine that "although Dr. Pevner suffered only $363,100 in out-of-pocket losses, the district court did not abuse its discretion by awarding him an additional sum [of

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[8](...continued)
of harm (SA 15).

$500,000] for emotional distress, humiliation, and other abstract harms" (SA 13). Furthermore, Dr. Pevner had *every right* to recover these additional, non-economic damages under the teachings of this Court in *Carey* and *Stachura*, *supra*.

Atlantic City's argument that Dr. Pevner did not *seek* to recover damages for non-monetary harm is further belied by the fact that Dr. Pevner specifically sought damages for "mental anguish, emotional distress, embarrassment and humiliation, fright, fear, personal indignity and anxiety" as well as harm to his reputation in his complaint (A 13-14), and in his opening and closing speeches to the jury, these damages were described and sought with force. In addition, the district court gave the jury comprehensive instructions on all of these non-economic damages, with no objection from Atlantic City. These instructions, which were submitted in writing by Dr. Pevner, were entirely consistent with the evidence presented at trial as well as the holdings of this Court in *Carey* and *Stachura, supra*.

In their respective opinions, the district court and the Third Circuit reviewed the compelling, unrebutted evidence of pain and suffering, emotional distress, mental anguish, humiliation and harm to reputation which Dr. Pevner sustained as a result of Atlantic City's violations of § 1983 (A 23-28, 38-49; SA 6-16). These factual findings merely underscore the lack of merit in Atlantic City's argument that Dr. Pevner failed to prove that he sustained any non-economic harm. In particular, the district court's findings that Dr. Pevner "experienced severe emotional distress throughout the period in which he received the summonses and continuing through the municipal court prosecution and appeal, and...that the City's wrongful conduct was the proximate cause of the distress" (A 41), is amply supported by the unrefuted testimony of Dr. Pevner's witnesses. In

addition, there was an abundance of evidence which supported the district court's and Third Circuit's findings that Dr. Pevner's mental distress and emotional illness caused by the 1989-91 prosecution did not improve when the prosecution ended in 1991, but rather, continued until the time of trial in 1996 (A 23, 26-27, 33,34, 38-39,42-43, 48; SA 8-10, 15). For example, there was uncontradicted evidence which showed that whereas Dr. Pevner had always been a fun-loving, optimistic and socially active person prior to the prosecution, from 1989 until 1996 his mood had changed to one of chronic depression and pessimism, as a result of which he all but abandoned his dental practice and spent most of his time sitting at home, sleeping and fretting about being prosecuted again (A 23, 27, 38-39, 42-43). Two of Dr. Pevner's long-time friends and one of his patients gave unrebutted testimony that enabled the jury to determine that, as a result of the prosecution and during the years 1989 through 1996, he had become angry, hostile, argumentative, depressed and confused – a far cry from the outgoing, fun-loving, jovial man they had known in the years prior to 1989 (A 26-27, 33-34, 38, 42-43, 48). Moreover, Dr. Pevner presented the testimony of his treating psychiatrist who stated, without contradiction, that the cause of all of Dr. Pevner's stress and anxiety from 1989 to 1996 was the criminal prosecution (A 25-26, 39-40, 43, 48). Thus, the Third Circuit was easily able to conclude that Dr. Pevner's witnesses established "that he had sustained extensive pain and suffering since 1989" and "that the City's prosecution caused Dr. Pevner severe emotional distress...[and] ruined his dental career and professional life" (SA 15).

D. There was ample evidence which established that Dr. Pevner's emotional distress from 1989 to the time of trial was proximately caused by Atlantic City's violations of 42 U.S.C. § 1983

In its petition, Atlantic City has rehashed the same argument it made, unsuccessfully, to the district court and Third Circuit: that Dr. Pevner failed to prove that any of the emotional distress he claimed to have suffered after June of 1991 (when his criminal conviction was overturned) was proximately caused by Atlantic City's prosecution of him during the years 1989 through 1991. Atlantic City urges that since the prosecution ended in 1991 (with a ruling in his favor) and he did consult a psychiatrist until 1994, anything that happened to Dr. Pevner after June of 1991 – including his reaction to threatening correspondence he received from Atlantic City in 1994 – could not have proximately resulted from the prosecution.[9]

The simple response to this argument is that all of the evidence showed the opposite, and gave the jury a reasonable basis for finding that Dr. Pevner endured severe emotional distress from 1989 until the time of trial on 1996 as a result of the 1989-91 prosecution. As the district court noted, Dr. Pevner offered a wealth of unrebutted testimony from at least five witnesses which established that he continued to be plagued by severe anxiety, depression, mental illness and emotional distress – as a result of the prosecution – on an ongoing basis from 1989 until 1994, and that his response to Atlantic City's 1994 correspondence resulted in a temporary (albeit severe) aggravation of his pre-existing, severe emotional problems that were caused by the wrongful prosecution in the years 1989-91 (A 41-44, 47-48). For example, Dr. Pevner's treating psychiatrist expressed the

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[9] The evidence showed that Dr. Pevner suffered a severe emotional reaction to letters he received from Atlantic City in 1994 which gave him reason to believe that he would be prosecuted again by Atlantic City under the same Ordinance that had been invalidated three years earlier (A 24, 48-49).

opinion that Dr. Pevner's severe psychological problems had their onset with the prosecution in 1989 and continued unabated until 1994; he explained to the jury the medical reasons why Dr. Pevner did not return to his "old self" after he "won" his criminal case in 1991 (A 43). Other witnesses testified that after 1991, Dr. Pevner lived in constant fear that he was going to be prosecuted again and that his anxiety, depression, confusion and other mood changes did not subside after June of 1991, but rather, continued to plague him on a chronic basis until he received Atlantic City's correspondence in 1994 (A 42-43, 48). Based upon this evidence, the district court concluded that the jury could have reasonably found that the 1994 correspondence merely "exacerbated the pre-existing emotional problems that were precipitated by Atlantic City's prior wrongful conduct" and that Dr. Pevner's reaction to that correspondence was merely "a manifestation of the underlying condition from which [he] suffered as a result of the City's actions" (A 41-44). Accordingly, Atlantic City's attempt to isolate the events surrounding Dr. Pevner's reaction to the 1994 correspondence, and to treat that reaction as a "new injury," is devoid of evidentiary support; the jury had a proper basis to find that *all* of Dr. Pevner's emotional distress from 1989 through 1996 was proximately caused, and set in motion by the 1989-91 prosecution.[10]

In affirming the district court, the Third Circuit likewise rejected Atlantic City's argument that the evidence

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[10] The district court found also, based upon the unrebutted evidence, that the fact that Dr. Pevner waited until 1994 to seek professional help did not militate against the finding that his emotional distress continued uninterrupted from 1989 until 1994 (A 44). The district court summarized the evidence that showed Dr. Pevner was in need of psychiatric help from 1989 through 1994, but that he resisted going to a therapist in those years because he believed he would "get out of it himself" (A 44).

did not support the finding that any anxiety or distress which Dr. Pevner suffered after June of 1991 was proximately caused by Atlantic City's wrongful conduct (SA 9-11). The Third Circuit duly noted that the record contained extensive evidence, including the testimony of Dr. Pevner's wife, two of his long-time friends and his treating psychiatrist, which showed that Dr. Pevner "continued to experience severe anxiety, depression, mental anguish and emotional distress *as a result of the prosecution* from 1989 through 1994" (SA 10). For example, the treating psychiatrist testified that "there were no other stressors that...would cause these symptoms" other than Atlantic City's prosecution of Dr. Pevner (SA 10). This evidence, taken in its entirety, caused the Third Circuit to conclude, rightfully, that:

> [A] reasonable jury could have found that Dr. Pevner's emotional reaction in 1994 [to Atlantic City's correspondence] was not the result of any unrelated incident, or a distinct and separate cause in and of itself, but was, rather, the manifestation of a chronic, underlying emotional disorder which had continued unabated since the City first charged Dr. Pevner with a violation of the zoning ordinance in 1989 (SA 10-11).[11]

In summary, based upon the record that Dr. Pevner made at trial, it was well within the jury's province to resolve the proximate cause issue in his favor. The jury had every

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[11] Furthermore, the unrebutted evidence showed that Dr. Pevner continued to suffer severe mental anguish and emotional distress as a result of the prosecution from the time he received Atlantic City's correspondence in 1994 until the time of trial in 1996 (A 27, 38, 42-43).

right to find that Dr. Pevner was an "eggshell plaintiff" who was severely harmed by Atlantic City's wrongful conduct in the years 1989-91, as a result of which he was predisposed and more vulnerable to suffering *further* harm when he reasonably believed, upon reading the 1994 correspondence, that Atlantic City was going to prosecute him again under the same unconstitutional Ordinance. Since the district court charged the jury on the issue of proximate cause in accordance with the evidence and *Federal Jury Practice and Instructions* §§ 80.18, 80.19 and 103.14, with no objection from Atlantic City, Atlantic City cannot be heard to complain to this Court -- especially after the courts below rejected the same argument - that there was insufficient evidence of proximate cause.

E. The district court and Third Circuit properly determined that Dr. Pevner was entitled to an award of prejudgment interest

On June 6, 1997, the district court granted Dr. Pevner's motion to amend the judgment to include prejudgment interest (A 58-62). The district court awarded prejudgment interest because Dr. Pevner prevailed on his claim arising under § 1983 (A 59-60). It reviewed the controlling authority which supports the proposition that, in § 1983 cases, courts may award prejudgment interest in accord with equitable principles, and observed that "[c]ourts typically find that prejudgment interest should be awarded to a prevailing plaintiff in a Section 1983 action to effectuate the salutary purposes of the statute" (A 59-60). *See, Savarese v. Agriss*, 883 F.2d 1194, 1207 (3d Cir. 1989) (§ 1983 case)(where federal statute is silent on subject of prejudgment interest, trial court may, in its discretion, award prejudgment interest to prevailing plaintiff). The district court exercised its discretion in favor of awarding prejudgment interest to Dr.

Pevner under § 1983, noting that the equities of the case supported such an award (A 60-62).[12]

The Third Circuit affirmed the district court's award of prejudgment interest to Dr. Pevner, reasoning that the district court did not abuse its discretion and that the balance of the equities, including Atlantic City's resistance to settlement negotiations, warranted the award (SA 16-20). The Third Circuit relied in part on *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835-36 (1990), where this Court declared that prejudgment interest is an equitable remedy designed "to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant" (SA 17).

In its petition, Atlantic City does not take issue with the principle that the court in a § 1983 case has the equitable discretion to award prejudgment interest. Rather, Atlantic City urges that since the jury's verdict was a *general* verdict which awarded Dr. Pevner damages for Atlantic City's violations of both § 1983 and the New Jersey Constitution, and New Jersey law precludes awards of prejudgment interest against municipalities on claims arising under New Jersey *state* law, Dr. Pevner was not entitled to prejudgment interest. The district court and Third Circuit rejected this argument, and their decisions should neither be disturbed nor

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12 Applying similar logic, this Court in other types of federal question cases has affirmed awards of prejudgment interest in order to fully compensate injured parties. *See, e.g., Jacobs v. United States*, 290 U.S. 13, 17 (1933); (prejudgment interest awarded under Fifth Amendment for wrongful taking); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655-56 (1983) (prejudgment interest awarded in patent case); *Loeffler v. Frank*, 486 U.S. 549, 558 (1988) (prejudgment interest awarded in Title VII case as "an element of complete compensation").

reviewed. As the courts below determined, Atlantic City's contention that Dr. Pevner was not entitled to prejudgment interest on his *state* claim is irrelevant since he prevailed on his *federal* (§ 1983) claim. The district court correctly noted that where a plaintiff in federal court prevails on federal and state claims which arise from the same operative facts, the plaintiff may elect to receive prejudgment interest under *either* federal *or* state law. *Hatco Corp. v. W.R. Grace & Co.*, 849 F. Supp. 931, 980 (D.N.J. 1994) (A 59 n. 1). In this case, Dr. Pevner requested prejudgment interest under *federal* law (A 59 n. 1). Since prejudgment interest was undoubtedly available to him as the prevailing party on a § 1983 claim, it was unnecessary for the district court to determine whether prejudgment interest was *also* available under New Jersey law (A 59 n. 1).

The district court did not abuse its discretion for the additional reason that Dr. Pevner had the right to request prejudgment interest, under *federal* law, on the *entire* amount of the judgment because *all* of the damages he was awarded were attributable to his § 1983 claim (A 18, 59). The fact that a general verdict was returned that encompassed both the § 1983 and state tort claims does not make a difference because the federal and state claims arose from the same operative facts; the district court determined that the same conduct of Atlantic City resulted in violations of § 1983 and the New Jersey Constitution; the federal and state claims were grounded upon the same common law tort principles; the district court, without objection from Atlantic City, gave one comprehensive charge on compensatory damages which covered both claims; and consistent with its charge, the district court's verdict sheet asked the jury to determine, without apportionment, the total amount of damages that was needed to fairly compensate Dr. Pevner for Atlantic City's violations of § 1983 and the New Jersey Constitution (A 16-19, 29, 59).

In finding that the district court did not abuse its discretion in awarding Dr. Pevner prejudgment interest, the Third Circuit ruled that Atlantic City's argument that the district court improperly awarded Dr. Pevner prejudgment interest on his state tort claim was meritless (SA 17 n. 7). The Third Circuit reasoned that since the district court specifically noted it was awarding all of the prejudgment interest under *federal* law, not state law, and Dr. Pevner had elected to receive the interest under *federal* law alone, "there [was] not even an issue as to whether Dr. Pevner was entitled to prejudgment interest for the City's violations of state law" (SA 17 n. 7). Accordingly, there is no factual or legal basis for this Court to review the decision to award prejudgment interest to Dr. Pevner.

CONCLUSION

For all of the foregoing reasons, respondent, Dr. Milton Pevner, respectfully urges this Court to deny Atlantic City's petition.

Respectfully submitted,

/s/_____
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